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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 479

DILLARD MORRISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 377-382;[1] Pet. App. 1-7) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1965 (R. 383; Pet. App. 8). The petition

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[1] "R." designates the blue bound volume on file with the Clerk of this Court containing petitioner's appendix in the court of appeals and the opinion and judgment of that court.

for a writ of certiorari was filed on August 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court properly presented to the jury the issue of entrapment.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts charging substantive narcotic offenses in violation of 26 U.S.C. 4705 (a) (R. 4-5, 356). He was sentenced to concurrent sentences of 20 years' imprisonment on each count (R. 365-367). The court of appeals affirmed (R. 337-382; Pet. App. 1-7).

1. The evidence adduced by the government showed that on January 3, 1963, agent Howard Jackson was introduced to petitioner by special employee Miles as someone who wanted to purchase a large quantity of cocaine. Petitioner said he would be able to take care of Jackson's needs (R. 12-13). At petitioner's direction, after he had made some telephone calls, the three went to meet a person whom petitioner referred to as the "coke man". During the trip, petitioner said the cocaine "had been the best that he had seen in several years." Jackson insisted on a sample (R. 15). After meeting a man and receiving a package from him, petitioner handed Jackson the package and said "[H]ere's the coke, and the man claims it [is] dynamite." (Count one; R. 14-17, 123-125).

Jackson subsequently expressed satisfaction with the sample and wanted to buy an eighth of a kilo. Petitioner said "his connection" might not want to sell "that small a quantity" (R. 20-21). When petitioner requested payment in advance, Jackson said that he had been "beaten out of his money" on prior occasions and did not want to be "put in that position again" (R. 20-22). At this point petitioner and Jackson agreed to "forget the whole deal" until they could come to some agreement as to how they could do business (R. 22-23, 126).

Petitioner subsequently had Miles arrange a meeting with Jackson on January 12. At this meeting he told Jackson that he was "prepared to take care of the business in a better manner" (R. 27, 129). Petitioner, Jackson, Miles and a woman by the name of Lee Simone then drove off in petitioner's automobile (R. 28-29) to West 48th Street "where the coke man lived" (R. 29-30, 129-131). Jackson gave petitioner $2,000 in official government advance funds. As he left the automobile, petitioner told the agent not to worry about his "two grand", since he was leaving him "a $5,000 car as security" (R. 33). Immediately after petitioner and Miss Simone entered the premises, another automobile drove up and one Julio Hernandez (who was known to the agents) entered the premises and had a brief conversation with petitioner (R. 35, 131-132). Petitioner and Miss Simone then returned to the Cadillac and informed Jackson that the delivery would take about an hour (R. 34).

About 6:30 p.m., petitioner and Miss Simone again entered the premises. Some three hours later, Julio

Hernandez was seen to get out of a taxicab, take a "small white package" from another occupant of the taxi, and then enter the building (R. 36-37, 132-133). Shortly thereafter, Simone and petitioner returned to the automobile and Simone handed petitioner a "white package", which he in turn handed to Jackson saying "[h]ere is the coke" (R. 37, 133). On taking the package Jackson said it felt a "little light in weight to be an eighth of a kilo." Petitioner responded that if Jackson "had any complaints," to bring it back and he "would certainly make it good" (Count 2; R. 38).

The packages of white powder delivered by petitioner to agent Jackson on January 3 and 12, 1963, were not turned over pursuant to a written order form and were found to contain cocaine (R. 23-26, 39-42, 127-128, 135-137, 176-178).

2. Petitioner's sole defense at trial was that he was entrapped into committing the narcotics offenses by the actions of special employee Miles. He said that in 1962 he won money from Miles at a "crap game" and that Miles made payments in cocaine (R. 186, 232-233). From that time until late in January 1963, petitioner, who was an addict, received cocaine from Miles about "three time a week or more", free of charge (R. 237, see also R. 186, 189, 208-209, 232-233, 236-237). During this period Miles repeatedly asked petitioner to get him cocaine because the cocaine Miles was getting "wasn't good" (R. 235-237, 187, 189, 190). Petitioner said he finally agreed to the January transactions because Miles threatened to cut off his free supply and promised that he could

take for his own use some of the cocaine delivered (R. 190-197, 221, 233-234, 240-243). Petitioner further stated that on January 12, after he had obtained the cocaine from his source in exchange for the $2,000 he had received from Miles (to whom he said the narcotics were sold), he removed "a little over a half ounce, maybe about three-quarters of an ounce" and gave the remainder to Miles (R. 220-223, 242-243). Petitioner testified on direct examination that he had previously been convicted on an assault charge and had three prior narcotics convictions—in 1943 or 1944, 1950 and 1958 (R. 183, 227-228).[2]

He testified on cross-examination that Miles had for approximately six months given him some $2500 worth of cocaine free of charge (R. 243-245); that no one else had ever done that for him (R. 246); and that at the time of the transaction he could not afford to buy cocaine. He admitted, however, that he had been purchasing cocaine for a number of years from someone he identified only as "Jim" and had another source, one "Pinton", from whom he obtained the January 12 narcotics (R. 250-256).

Joe Miles, called as a defense witness, testified that he never sold or gave petitioner any cocaine (R. 294-295). He said that he first spoke to petitioner about narcotics about "a week or maybe ten days" before petitioner gave agent Jackson the sample (R. 283, 287, 316-317); that, in response to his inquiries, peti-

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[2] He again admitted commission of these offenses on cross-examination (R. 247-248). In addition, he admitted on cross-examination to various convictions of assault in the 1940's through the 1960's (R. 267-270).

tioner stated that "there wasn't too much happening as far as heroin goes but cocaine, yes" (R. 286); that he thereafter arranged petitioner's meetings with agent Jackson; and that the two January transactions which followed were between Jackson and petitioner (R. 293-294, 296-297). Miles never told petitioner to take any of the narcotics for himself (R. 297, 299, 311).

Miles further testified (as had agents Jackson and Smith (R. 45, 47, 154-155)), that he never received money or narcotics from the Bureau of Narcotics for his work as an informant (R. 315) and he denied being told that unless he cooperated he would go to jail (R. 315). He stated that from what they had told him, he expected the agents to bring his cooperation to the attention of the court and that he was expecting to receive a suspended sentence on a 1963 narcotics charge for which he had been arrested prior to becoming a special employee (R. 275-282).[3]

3. The trial court, *inter alia*, instructed the jury that one of the defense claims was that the transactions of January 3 and 12, 1963, were "between [petitioner] and the special employee or informer" (R. 343) and that, in order to convict the petitioner on either or both of these counts, the jury had to find

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[3] Agent Smith testified in this connection that in April 1962 he had arrested Miles on a narcotics charge and, as far as he knew, the case had not yet been disposed of (R. 150-181). He further stated that Miles had been advised that "any cooperation that he extended to the Bureau of Narcotics would be made known to the presiding judge at the time that his own instant case was reported to trial." (R. 155-156).

"that the narcotic drug or drugs were either sold or bartered or exchanged or given away to Howard Jackson, nobody else but Howard Jackson; * * *" (R. 338).

The trial judge also instructed that in weighing the testimony of Miles the jury should keep "carefully" in mind that he "lives in hope" that he will get leniency when his case comes up for disposition; that this hope does not mean he "necessarily is a liar", but that it required the jury to "scrutinize his testimony with particular care" (R. 349-350).

The judge charged additionally in pertinent part (R. 344-346, 350):

> * * * The fact that government agents merely afford an opportunity or opportunities for the commission of an offense does not constitute entrapment. Entrapment appears only when the criminal conduct was the creative activity of the law enforcement agents themselves * * *.
>
> * * * If the government can satisfy you that the accused, Mr. Morrison, was ready and willing to commit the offense or offenses charged whenever the opportunity offered itself, then there would not be any entrapment. * * *
>
> * * * Now, you are entitled to consider the evidence and decide. Was Mr. Morrison a man who by predisposition was ready, willing and able to give away narcotics or sell narcotics in the days in question and was only offered an opportunity which he was only too eager to take? If that is all that you find from the evidence, then there was no entrapment and there would be no legal defense to the crimes charged.

On the other hand, if you find from all the circumstances here, keeping in mind what the evidence shows as to the previous character and disposition and activities of the accused, that he was no more than an innocent person who was unfairly induced or coerced by the conduct of the agents or by Miles who was really an employee of the agents, if you find that the circumstances are such to show that the agents forced him or pushed him to do something that he would not otherwise have done, then you would find a situation of entrapment and it would be your duty to acquit Dillard Morrison of the crimes charged.

In this connection, when I say you are entitled to consider all the evidence, I mean just that literally, ladies and gentlemen. You are not only to assay the testimony as to what transpired on the given days in question, but also any information which shows the type of man that Mr. Morrison was, the type of man that Mr. Miles was, what Morrison had done previously, what his record was; all of that might have a very crucial bearing on your deliberations on this claim of entrapment of the defendant.

* * * *

Well, obviously, Mr. Morrison is not on trial for any other charges than the ones I have been discussing, and thus it is not relevant to the charges of the criminal conduct as such that any previous record be considered. However, you would be entitled to consider such evidence as you recall of a previous criminal record on the part of the defendant in assaying his credibility, just as in the case, in other words, of Mr. Miles.

There was no exception to the charge on the entrapment issue.

ARGUMENT

As this Court stated in *Lopez* v. *United States*, 373 U.S. 427, 434, the "conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents" (emphasis in original). See also *Sherman* v. *United States*, 356 U.S. 369, 372-373; *Sorrells* v. *United States*, 287 U.S. 435, 441, 451. The ultimate issue is, as the trial judge charged, whether the criminal conduct was the product of the creative activity of law-enforcement officers. That ultimate issue necessarily involves two factors—the conduct of the officers and the character of the accused. This Court said in *Sherman* v. *United States*, *supra*, 356 U.S. at 373:

> On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an "appropriate and searching inquiry into his own conduct and predisposition" as bearing on his claim of innocence.

The trial judge's charge, to which petitioner took no exception, properly put this ultimate issue, and the factors which enter into it, to the jury in terms which closely follow this Court's *Sherman* decision. (See pp. 7-8, *supra*).

Much of petitioner's argument stems from the fact that the opinion of the court of appeals, looking toward future cases, has endeavored to refine the factors which go into the ultimate issue as two alterna-

tive bases for finding entrapment, ruling that government misconduct may constitute a basis for the defense of entrapment regardless of the predisposition of the defendant. Whatever the merits of this analysis it does not bear upon this case, where there was no showing of police initiative beyond the use of an informer to make an introduction.

As to the element of predisposition, this Court has said that, "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." *Sorrells* v. *United States*, 287 U.S. 435, 451-452; *Sherman* v. *United States*, 356 U.S. 369, 373. Petitioner argues (Pet. 12) that the trial judge should have admonished the jury to disregard those of petitioners's prior convictions remote in time and different in kind from the present charge. But it was defense counsel who initially introduced into evidence the major portion of petitioner's criminal record. Moreover, the trial court specifically admonished the jury that petitioner was "not on trial for any other charges" and that it was "not relevant to the charges of the criminal conduct as such that any previous record be considered" (R. 350). In any event, inasmuch as petitioner took the stand in his own defense, these convictions could, as the trial judge further charged, be considered by the jury in "assaying his credibility" (R. 350).

When read in context, the court's use of the term "innocent person" in the instructions, while perhaps

inapt, did not confuse the jury as petitioner contends. The instruction as a whole made it clear that if petitioner had been pushed by government agents into committing the acts, he could not be convicted. Moreover, petitioner is foreclosed from relying upon this phrase as grounds for reversal in view of his failure to object at the trial. Rule 30, F.R.Crim.P.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
*Acting Solicitor General.**

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

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* In lieu of the Solicitor General, who has disqualified himself.

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